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Supreme Court, U.S.
FILED
DEC 18 1992
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No. 92-911

In the Supreme Court of the United States

October Term, 1992

**PIPEFITTERS PENSION TRUST;
PIPEFITTERS LOCAL UNION NO. 562;
JOHN MARSHAL, administrator and
fiduciary of all plaintiff funds;
LESTER GROSS, JOE BARRY, DON DEVITT,
ROBERT MCDONALD, trustees,**

Petitioners,

v.

RUSSELL WALDO,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Respondent's Brief in Opposition

JOHN W. ELLINGER*
Marc H. Ellinger
507 East High Street
Jefferson City, Missouri 65101
**Counsel of Record* (314) 634-2311

December 18, 1992

QUESTIONS PRESENTED

I

WHETHER A DOMINANT SHAREHOLDER IS PERSONALLY LIABLE FOR A CORPORATIONS FAILURE TO MAKE EMPLOYEE BENEFIT CONTRIBUTIONS UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, AS AMENDED (ERISA).

II

WHETHER THE RESPONDENT, AS DOMINANT SHAREHOLDER, IS PERSONALLY LIABLE FOR SUCH EMPLOYEE BENEFITS UNDER ANY OTHER STANDARDS, OR FOR HIS OWN PERSONAL ACTS.

LIST OF PARTIES

Respondent adopts Petitioners' List of Parties.

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IN THE
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PIPEFITTERS HEALTH AND WELFARE TRUST;
PIPEFITTERS PENSION TRUST;
PIPEFITTERS LOCAL UNION NO. 562;
JOHN MARSHALL, ADMINISTRATOR AND
FIDUCIARY OF ALL PLAINTIFF FUNDS;
LESTER GROSS, JOE BARRY, DON DEVITT,
ROBERT MCDONALD, TRUSTEES

Petitioners,

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Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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RESPONDENT'S BRIEF IN OPPOSITION

JURISDICTION

Respondent adopts and incorporates herein Petitioners' Jurisdictional Statement.

CORRECTIONS TO PETITIONERS' BRIEF

The opinion of the Court of Appeals is correctly reprinted in Appendix B of the Petitioners' Brief. The opinion of the Eighth Circuit is incorrectly cited as 872 F.2d 815 (8th Cir. 1989); it is actually reported at 969 F.2d 718 (8th Cir. 1992).

Other corrections to the Petitioners' Brief are as follows:

Pg. iv: Amalgamated Insurance Fund v. Danin, 648 F.Supp. 1142 (D.Mass. 1986) is incorrectly cited as 448 F.Supp 1142 and is cited incorrectly in the balance of the text, the pages of which are also misnumbered.

Pg. 13: Gambino V. Index Sales Corporation, 673 F.Supp. 1450 (N.D. Ill. 1987) is incorrectly cited as the M.D. Ill.

Pg. 19: Legislative History, Public Law 93-406, p. 4854 U.S. Code Congress and Admin. News, 1974 is incorrectly cited as Legislative History, Public Law 83-406, p. 5854 U.S. Code Congress and Admin. News, 1974.

STATEMENT OF THE CASE

Respondents adopt Petitioners' Statement of the Case insofar as the sequence of litigation is concerned and of the facts, generally.

However, it should be emphasized that the formation of the second corporation was at the instigation of Petitioning union and not that of R. Waldo, Inc. or Respondent Russell Waldo. Also, Petitioners' Statement

of the Case glosses over the fact that the District Court entered a final judgment after a trial and not after a ruling on motions to dismiss or summary judgment.

The evidence offered is sufficient that the corporate structure was observed, that no wrong-doing occurred, and that the District Court's analysis of the evidence before it was not an abuse of discretion nor clearly erroneous.

REASONS FOR DENYING THE WRIT

The respondent contends as follows:

1. There are no significant differences in results obtained in the various circuits, and only modest differences in the language utilized.

2. That if there is a difference in standards, this case is inappropriate to determine those differences because the

facts, as determined by the District Court and affirmed by the Court of Appeals, would meet the standards of any of the various Courts of Appeals that have addressed this issue.

ARGUMENT

I.

THERE IS NO DISAGREEMENT AMONG THE COURTS OF APPEAL AS TO WHETHER A CONTROLLING SHAREHOLDER IS AN EMPLOYER PURSUANT TO TITLE 29 U.S.C. § 1002(5) AND IS PERSONALLY LIABLE FOR UNPAID CONTRIBUTIONS TO EMPLOYEE BENEFIT FUNDS

A Petition for a Writ of Certiorari should only be reviewed by the Supreme Court if jurisdiction is found under the rules of the Supreme Court of the United States. In this case, Rule 10 applies to the Petitioners' Petition for Writ of

Certiorari. It appears that Petitioners are attempting to show a disagreement among the lower federal courts and thus comply with the requirements of Rule 10.1(a). The Petitioners fail in this attempt due to the dictates of Rule 10.1(a):

> **When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so departed from the accepted and usual course of judicial proceedings, or so sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.**

Rule 10.1(a), Rules of the Supreme Court of the United States.

Throughout Petitioners' argument there has been no inference of a Court of Appeals which has decided the issue at hand in a manner conflicting with any other Court of Appeals decision. The only standing decision that conflicts with the decision of the Eighth Circuit in the current case is that of West Virginia-Ohio Valley Area IBEW Welfare Fund v. Ball Electric Company, Inc., 685 F.Supp. 953 (S.D.W.Va. 1988). This is a decision of a District Court and as such does not meet the requirements of Rule 10.1(a). There is no indication by the Petitioners that any Courts of Appeals has reached a conflicting opinion with that of the Eighth Circuit. In fact, Petitioners state five other circuits that are in harmony with the Eighth Circuit. Operating Engineers Pension Trust v. Reed, 726 F.2d 513 (9th Cir. 1984); Solomon v. Klein, 770

F.2d 352 (3rd Cir. 1985); International Brotherhood of Painters and Allied Trades Union v. George A. Kracher, Inc., 856 F.2d 1546 (D.C. Cir. 1988); Scarbrough v. Perez, 870 F.2d 1079 (6th Cir. 1989); Plumbers' Pension Fund, Local 130 v. Neidrich, 891 F.2d 1297 (7th Cir. 1989). The First Circuit has also viewed this issue and reached the same decision as the other circuits. Massachusetts Laborers' Health and Welfare Fund v. Starrett Paving Corp., 845 F.2d 23 (1st Cir. 1988).

Petitioners also cite two other District Courts as finding a conflict between courts. Both decisions are used as the underpinnings of the Ball Electric case. Amalgamated Insurance Fund v. Danin 648 F.Supp. 1142 (D.Mass. 1986) and Gambino v. Index Sales Corporation, 673 F.Supp. 1450 (N.D.Ill. 1987). Neither decision has been

followed by their respective Circuit Courts of Appeal, in fact, they have been de facto overruled. Massachusetts Laborers' Health and Welfare Fund v. Starrett Paving Corp., 845 F.2d 23 (1st Cir. 1988) and Plumbers' Pension Fund, Local 130 v. Niedrich, 891 F.2d 1297 (7th Cir. 1989).

In fact, Petitioners even cite a non-reported case from the Northern District of Illinois, which merely endorses a plain meaning approach. Laborers' Pension Fund v. Bakke Construction Company, Inc., (N.D.Ill. 1987), (not reported in F.Supp.; 1987 W.L. 1988). Yet the Seventh Circuit has clearly and consistently ruled in agreement with the Eighth Circuit. Plumbers' Pension Fund, Local 130 v. Niedrich, 891 F.2d 1297 (7th Cir. 1989), Levit v. Ingersoll Rand Financial Corp., 874 F.2d 1186 (7th Cir. 1989).

Petitioners state that ERISA is given broad application to protect workers, yet the only cited circuit opinion relates purely and exclusively to the issue of attorney's fees in ERISA actions. Smith v. C.M.T.A.-I.A.M. Pension Fund, 746 F.2d 587 (9th Cir. 1984). Yet even the Petitioners admit, as they must, that this same Circuit, the Ninth, is in accord with the Eighth Circuit on the issue at hand. Operating Engineers' Pension Trust v. Reed, 726 F.2d 513 (9th Cir. 1984).

There is no conflict among the Eleven Circuits and as such the Petitioners fail to comply with Rule 10 and therefore the Petitioners Petition for Writ of Certiorari should be denied.

II.

THERE IS NO IMPORTANT ISSUE OF FEDERAL LAW

TO BE DECIDED AND FAIR AND EQUITABLE TESTS HAVE BEEN DEVELOPED AMONG THE CIRCUITS AND THE RESULTS WOULD HAVE BEEN THE SAME UNDER A MORE EXPANSIVE STANDARD.

The other avénue that may allow the Petition for Writ of Certiorari to be granted stems from Rule 10.1(c):

> **When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.**

Rule 10.1(c), Rules of the Supreme Court of the United States.

Though there is no conflict with prior decisions of the Supreme Court there is always the attempt to have the Supreme Court

rule on a federal issue. In this case the Circuits are in accord. There is no need for the Supreme Court to decide this issue as the Courts of Appeals have established fair and equitable tests that fully comport with the language and intent of the Employee Retirement Income Security Act, 29 U.S.C. 1001 et seq. Even under the liberal view of the First Circuit, with its assumption that a shareholder is an employer with regards to 29 U.S.C. 1002(5), Mr. Waldo "is not an 'employer ... obligated to make contributions to an employee welfare plan.' Consequently, ERISA does not impose upon him the federal duty to make such contributions." Massachusetts Laborers' Health and Welfare Fund v. Starrett Paving Corp., 845 F.2d 23,25 (1st Cir. 1988) quoting Alman v. George Manufacturing Corporation, 680 F.Supp. 56,57 (D.Mass.

1988):

> For one thing, the statute's language quite clearly states that the duty in § 1145 arises only in respect to employers "obligated" to make the contributions. Although Starrett's corporation may have been obligated to make the contributions, Starrett personally was not. For another thing, the legislative history of § 1145 indicates that the language means what it says. When Congress enacted the provisions in 1980, the Senate Committee on Labor described it as follows:
>
> > The public policy of this legislation ... mandates that provision be made to discourage delinquencies and simplify delinquency collection. The bill

> imposes a Federal statutory duty to contribute on employers that are already contractually obligated to make contributions to multiemployer (sic) plans.
>
> Staff of Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., The Multiemployer Pension Plan Amendments of 1980: Summary and Analysis of Consideration 44 (Comm.Print 1980)(emphasis added).

"Massachusetts Laborers'" at p.25. This line of reasoning has been followed by the Seventh Circuit:

> In Levit v. Ingersoll Rand Financial Corp., 874 F.2d 1186 (7th Cir. 1989) ... we were required to determine whether a corporate officer could be held personally liable for a corporation's pension contributions in

the absence of a contract personally binding to these obligations. In resolving this question we turned to Section 515 of ERISA, 29 U.S.C. §1145 that requires '[e]very employer who is obligated to make contributions to a multi-employer plan under the terms of the plan or under the terms of a collectively bargained agreement [to] make such contributions in accordance with the terms and conditions of such plan or such agreement.' We stated that under Section 515:

> 'Only "an employer <u>who is obligated to make contributions</u> to" a plan under an agreement need to so. Such an employer must make contributions "in accordance with the terms and conditions of such plan or such

agreement." Even if a manager or other officer is an "employer" under §3(5) [of ERISA), the plan or other agreement still governs what each must do, for not all "employers" are "obligated to make contributions" under the "terms and conditions" of a plan or agreement. [Central States Pension Fund v. Gerber Truck Service, Inc., 870 F.2d 1148 (7th Cir. 1989) (en banc)] holds that these documents will be strictly enforced. Exactitude works both ways. Just as pension and welfare funds get no less than the agreements provide, so they get no more ... Several plans obtained Richard Deprizio's [the corporate officer] personal

> **commitment, as co-maker of notes with Deprizio Co.'s commitment to pay. Section 515 requires us to honor the difference between these engagements.'**
>
> **Levit, 874 F.2d at 1193 (emphasis added).**

Plumbers' Pension Fund, Local 130 v. Niedrich, 891 F.2d 1297,1300 (7th Cir. 1989).

These cases show the most expansive reading of the applicable ERISA sections. Other circuits have found that personal liability only applies when the corporate veil can be pierced. Scarbrough v. Perez, 870 F.2d 1079 (6th Cir. 1989). "Limited liability is a hallmark of corporate law. Surely if Congress had decided to alter such a universal and time-honored concept, it would have signaled that resolve somehow in

the legislative history." International Brotherhood of Painters and Allied Trades Union v. George A. Kracher, Inc., 856 F.2d 1546,1550 (D.C. Cir. 1988).

> Moreover, we find nothing in the legislative history to indicate that Congress intended to impose a personal liability on a shareholder or a high-ranking officer of a corporation for ERISA contributions owed by the corporation. Appellants rely primarily on the analysis in Massachusetts State Carpenters Pension Fund v. Atlantic Diving Co., Civ. No. 83-2872 (D.Mass. October 12, 1984). We are not impressed by the Massachusetts district court's analysis. It relied not on the interpretation of the ERISA statute but on the Fair Labor Standards Act

and precedents of the First Circuit.

> **The method of analogy is, of course, a legitimate method of reaching a decision. But in matters of statutory construction of ERISA our responsibility is to ascertain the intention of Congress in ERISA and not its intention in enacting a separate federal statute.**

Solomon v. Klein, 770 F.2d 352,354-5 (3rd Cir. 1985). The Ninth Circuit has also reached a similar decision. Operating Engineers Pension Trust v. Reed, 726 F.2d 513 (9th Cir. 1984).

Regardless of which Circuits' view is applied, the result, in this case, would be the same. There is no need for the Court to address this issue under Rule 10.1(c). The courts of appeals have sufficiently covered this issue and the result in the case at

hand would not be changed by any other circuit.

CONCLUSION

The Petition for Writ of Certiorari should be denied because there is no substantial difference between the circuits, there is no federal issue raised in substance, and that the facts of this case are inappropriate to resolve differences between the circuits, if there were any. No difference in result would obtain even by the imposition of the standards suggested by Petitioners since there was nothing signed or promised by Respondent Russell Waldo. Neither were there any culpable acts on his part and these findings were made by the District Court based upon the evidence.

Petitioners ask the Court to rule on an abstract proposition of law which does not

relate, nor is in accord with, the facts as found by the District Court, after evidentiary hearing, and affirmed by the Court of Appeals as, in accordance with the standard of review, agreed by Petitioners, as not "clearly erroneous."

Surely this is not worthy of certiorari.

This case is not worthy of further review because under the facts, the Supreme Court would have to conclude that corporate officers, directors and shareholders of small corporations were always responsible personally for the act of the corporations, irrespective of individual culpability. In short, the Court would have to hold that the individual is personally responsible for any error of judgment. That is not the rule of any court.

A principal complaint by Petitioners at

both the District Court and at the Court of Appeals involved a transfer of real property. The District Court found there was nothing improper about this transfer (Petitioners' Appendix B). However, if Petitioners contend that there were other transfers, the appropriate remedy is to pursue execution through the District Court. Instead the Petitioners have requested the Court of Appeals, and now the Supreme Court, to do for them what should properly be done as a post-judgment remedy. Surely, this is not grounds for Certiorari.

Petitioners have merely restated their arguments at the District Court and the Court of Appeals levels. They have not shown significant reasons why Certiorari should be granted.

Therefore Respondent respectfully requests that certiorari be denied.

Respectfully submitted,

JOHN W. ELLINGER, Counsel of Record
MARC H. ELLINGER
507 East High St.
Jefferson City, Missouri 65101
(314) 634-2311

Dated: December 18, 1992